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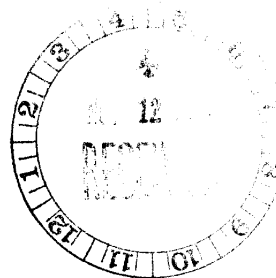
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November 12, 2004

The Honorable Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423



Re: Finance Docket No. 34561, Canadian Pacific Railway Company –  
Trackage Rights Exemption – Norfolk Southern Railway Company,  
Buffalo, NY

212519

Finance Docket No. 34562, Norfolk Southern Railway Company –  
Trackage Rights Exemption—Delaware and Hudson Railway Company,  
Inc., Between Saratoga Springs, NY and Binghamton, NY

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten (10) copies of the Reply of Canadian Pacific Railway Company and Delaware and Hudson Railway Company, Inc. In Opposition To Petitions To Revoke Exemptions ("Reply"), filed on October 25, 2004. A diskette containing an electronic version of the Reply is also enclosed.

Please acknowledge receipt of the Reply for filing by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,

*Terence M. Hynes*  
Terence M. Hynes  
Gabriel S. Meyer

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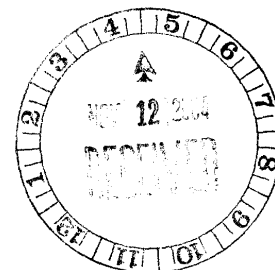
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DC1 736580v1 November 12, 2004 (09:31am)

212518

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



**Finance Docket No. 34561**

**CANADIAN PACIFIC RAILWAY COMPANY-TRACKAGE RIGHTS  
EXEMPTION-NORFOLK SOUTHERN RAILWAY COMPANY-BUFFALO, NY**

**Finance Docket No. 34562**

**NORFOLK SOUTHERN RAILWAY COMPANY-TRACKAGE RIGHTS  
EXEMPTION-DELAWARE AND HUDSON RAILWAY COMPANY, INC.  
BETWEEN SARATOGA SPRINGS, NY AND BINGHAMTON, NY**

**REPLY OF CANADIAN PACIFIC RAILWAY COMPANY AND  
DELAWARE AND HUDSON RAILWAY COMPANY, INC. IN OPPOSITION  
TO PETITIONS TO REVOKE EXEMPTIONS**

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**Dated: November 12, 2004**

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Public Record**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 34561**

**CANADIAN PACIFIC RAILWAY COMPANY-TRUCKAGE RIGHTS  
EXEMPTION-NORFOLK SOUTHERN RAILWAY COMPANY-BUFFALO, NY**

**Finance Docket No. 34562**

**NORFOLK SOUTHERN RAILWAY COMPANY-TRUCKAGE RIGHTS  
EXEMPTION-DELAWARE AND HUDSON RAILWAY COMPANY, INC.  
BETWEEN SARATOGA SPRINGS, NY AND BINGHAMTON, NY**

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**REPLY OF CANADIAN PACIFIC RAILWAY COMPANY AND  
DELAWARE AND HUDSON RAILWAY COMPANY, INC. IN OPPOSITION  
TO PETITIONS TO REVOKE EXEMPTIONS**

**INTRODUCTION**

Canadian Pacific Railway Company ("CPRC") and Delaware and Hudson Railway Company, Inc. ("D&H") submit this Reply in opposition to (1) the "Petition To Revoke The Class Exemption For The Two Notices" (the "UTU-NY Petition to Revoke") filed in the above-captioned proceedings on October 25, 2004 by Samuel J. Nasca, for and on behalf of United Transportation Union – New York State Legislative Board ("UTU-NY"), and (2) the "Petition To Revoke Exemptions And To Stay Transactions" (the "BLET Petition to Revoke") filed in the above-captioned proceedings on October 25, 2004 by The Brotherhood of Locomotive Engineers and Trainmen ("BLET"). UTU-NY and BLET are at times referred to collectively herein as "the Unions." For the reasons set forth in this Reply, the UTU-NY Petition to Revoke and the BLET Petition To Revoke should be denied.<sup>1</sup>

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<sup>1</sup> BLET's request for a stay of the trackage rights transactions that are the subject of the Notices filed by CPRC in Finance Docket No. 34561 and by Norfolk Southern Railway Company ("NSR") in Finance Docket No. 34562 was denied by the Board in a decision served on October 27, 2004 (the "*October 27 Decision*").

## **I. STANDARDS GOVERNING PETITIONS FOR REVOCATION**

The standards governing the Board's consideration of a petition to revoke an exemption are well-established. Section 10502(d) authorizes the Board to revoke an exemption when it finds that "application in whole or in part of a provision of [Title 49] to the person, class or transportation is necessary to carry out the transportation policy of section 10101 of this title." 49 U.S.C. § 10502(d). Revocation is not warranted unless the petitioner affirmatively demonstrates that formal regulation of the transaction is necessary to carry out the Rail Transportation Policy. In applying this standard, the Board's analysis focuses on those sections of the Rail Transportation Policy that are related to the underlying statutory provision from which the exemption was granted. *Minnesota Commercial Ry., Inc. – Trackage Rights Exemption – Burlington Northern R. Co.*, 8 I.C.C.2d 31 (1991) ("*Minnesota Commercial Ry.*").

"The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted." *Minnesota Commercial Ry.* at 35. See also Finance Docket No. 34503, *Timber Rock Railroad, Inc. – Lease Exemption – The Burlington Northern and Santa Fe Ry. Co.*, (served October 7, 2004) at 2; Finance Docket No. 33326 *et al.*, *I&M Rail Link LLC – Acquisition and Operation Exemption – Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway*, 2 S.T.B. 167 (1997), *aff'd sub nom. City of Ottumwa v. STB*, 153 F.3d 879 (8th Cir. 1998) ("*I&M Rail Link*"). The Unions have failed to make the showing required to justify revocation of the class exemptions at issue here.

## **II. REGULATION OF THE OVERHEAD TRACKAGE RIGHTS THAT ARE THE SUBJECT OF THE CHALLENGED NOTICES IS NOT NECESSARY TO CARRY OUT THE RAIL TRANSPORTATION POLICY.**

In the absence of the class exemption set forth at 49 C.F.R. § 1180.2(d)(7), the trackage rights at issue in these proceedings would be subject to regulation pursuant to 49 U.S.C.

§ 11324(d). Section 11324(d) provides that the Board “shall” approve a covered transaction unless it finds both that the transaction is likely to result in a “substantial lessening of competition, creation of a monopoly or restraint of trade in freight surface transportation” and that such anticompetitive effects outweigh the public interest benefits of the transaction. 49 U.S.C. § 11324(d). Accordingly, in determining whether formal regulation is necessary to carry out the Rail Transportation Policy in this case, the Board’s primary focus must be on the competitive impact of the subject trackage rights. *I&M Rail Link* at 181-82; *Minnesota Commercial Ry.* In addition, parties may raise issues concerning the appropriate level of labor protection via a petition for revocation. *Id.* The Unions have failed to demonstrate that the trackage rights at issue in these proceedings would result in any lessening of competition, nor have they established any basis for imposing labor protective conditions other than the conditions for trackage rights transactions adopted in *Norfolk and Western Railway Co. – Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980).

**A. The Overhead Trackage Rights That Are The Subject Of The Challenged Notices Will Not Result In A Lessening Of Competition.**

UTU-NY claims that the overhead trackage rights granted to CPRC on NSR’s lines in the Buffalo terminal area in Finance Docket No. 34561 (the “CPRC Buffalo trackage rights”), and the overhead trackage rights granted to NSR on D&H’s line between Saratoga Springs and Binghamton, NY in Finance Docket No. 34562 (the “NSR Saratoga-Binghamton trackage rights”) are “anti-competitive” because they would “permit the reduction of competition” by enabling D&H to discontinue its trackage rights on the Southern Tier line. UTU-NY Petition To Revoke at 12. BLET asserts that the subject trackage rights are anticompetitive because “D&H will surrender all of its rail freight business on these routes to NSR.” BLET Petition To Revoke at 3. The Unions’ contentions have no substance, for several reasons.

First, these claims address the purported competitive consequences of D&H's proposal to discontinue its trackage rights operations on the Southern Tier, not the trackage rights that are the subject of the Notices in these proceedings. D&H's Discontinuance Petition is not at issue here; the Board will consider the effects of that transaction in Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson Railway Company, Inc. – Discontinuance of Trackage Rights Between Lanesboro, PA and Buffalo, NY, In Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie and Genesee Counties, NY.*<sup>2</sup> The Unions' assertions regarding the competitive impact of the D&H Discontinuance Petition provide no basis for revoking the trackage rights class exemptions in these proceedings.

Second, as both UTU-NY and BLET acknowledge (UTU-NY Petition To Revoke at 8-9; BLET Petition To Revoke at 8-9), the CPRC Buffalo trackage rights will not be implemented unless and until the Board grants the exemption sought by D&H's Discontinuance Petition. Therefore, those trackage rights cannot have any effect on competition until the Board acts on the D&H Discontinuance Petition.<sup>3</sup>

Third, the trackage rights at issue in these proceedings are purely "overhead" rights. In promulgating the trackage rights class exemption, the ICC found that overhead trackage rights "maintain the competitive balance among carriers, preserve shippers' existing transportation choices, give shippers access to alternative routes with shorter, faster, or otherwise improved

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<sup>2</sup> BLET repeats essentially the same arguments as it proffers here in its Comments filed on November 10, 2004 in Docket No. AB-156 (Sub-No. 25X).

<sup>3</sup> UTU-NY's assertion that "CPRC can exercise some rights under the Bison Yard Terminal Services Agreement prior to the D&H discontinuance approval" (UTU-NY Petition To Revoke at 9) is wrong. The provision upon which UTU-NY relies to support this claim (Section 7(a)) states only that the agreement became "effective" – i.e., it became a binding contract – on the date it was executed by the parties. What UTU-NY fails to acknowledge is that Section 7(a) goes on to say that "the provision of services by NSR under this Agreement shall not commence" until the effective date of any STB approval or exemption of the D&H Discontinuance Petition. See Summary of Documents filed by CPRC, D&H and NSR on October 12, 2004, Tab 7, Bison Yard Terminal Services Agreement, ¶ 7(a).

routing and increase the operational efficiency of the participating carriers.” *Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 275-276 (1985) (“*Trackage Rights Class Exemption*”). Neither UTU-NY nor BLET articulates any reason why these conclusions are not equally applicable to the overhead trackage rights at issue here.

Contrary to the Unions’ unsupported assertions, the CPRC Buffalo trackage rights, in conjunction with the haulage and switching agreements entered into between D&H and NSR, will promote – not diminish – competition by improving the efficiency of D&H service and assisting D&H in its efforts to attain profitability.<sup>4</sup> The NSR Saratoga-Binghamton trackage rights likewise will enhance competition by creating a shorter, more efficient route for CN-NSR interline traffic moving between Quebec and the Maritime Provinces, on the one hand, and the Eastern United States, on the other hand. Today that traffic must move via Buffalo, NY on a route that is 330 miles longer than the proposed haulage/trackage rights route via Rouses Point, NY. The Board (and the ICC before it) “have long recognized that operating arrangements designed by carriers to promote more efficient or economical operations promote the national [rail] transportation policy and should be encouraged.” Finance Docket No. 31448, *Joint Use By CSX Transportation, Inc. and Burlington Northern Railroad Company of Facilities at Memphis, TN*, (served June 12, 1989) (quoting Finance Docket No. 30703, *Soo Line R. Co.—Joint Use of Lines—Chesapeake and Ohio Ry. Co.*, (served August 22, 1986) at 9 (emphasis added).

In denying the Unions’ petitions to stay the trackage rights transactions in these proceedings, the Board concluded that “[t]he arrangements, as laid out in D&H’s exemption,

<sup>4</sup> BLET’s assertion (BLET Petition To Revoke at 4) that D&H service between Saratoga and Binghamton will be “supplanted” by NSR’s trackage rights on that line is wrong. The Saratoga – East Binghamton Trackage Rights Agreement permits NSR to handle only CN-NSR interline traffic that D&H will move for NSR’s account between Rouses Point and Saratoga Springs, NY pursuant to the Rouses Point – Saratoga Springs Haulage Agreement. See Summary of Documents filed by NSR, CPRC and D&H on October 12, 2004, Tab 8, ¶ 2(c). That CN-NSR interline traffic does not move over D&H’s lines today. D&H will continue to provide the same train service between Saratoga Springs and Binghamton, NY as it does today.

preserve D&H's commercial access to every customer that D&H can access today, as well as the right to interchange traffic with every carrier that D&H can interchange traffic with today."

*October 27 Decision* at 4. The State of New York has likewise indicated that it is "satisfied" that the exchange of trackage rights and haulage rights among CPRC, D&H and NSR, and D&H's proposed discontinuance of trackage rights, "should not result in a reduction in freight transportation options currently available to D&H shippers, or a diminution of the current capabilities of carriers other than NS to interchange traffic with D&H." *See* Docket No. AB-156 (Sub-No. 25X), Reply of the State of New York to Petition for Exemption, filed November 10, 2004 at 3, ¶ 3. Neither UTU-NY nor BLET has articulated any "reasonable, specific concerns" that would warrant a contrary conclusion.

**B. The Ancillary Arrangements Among CPRC, D&H And NSR Provide No Basis For Revocation Of The Trackage Rights Class Exemption.**

UTU-NY asserts that the trackage rights at issue in these proceedings do not qualify for the class exemption set forth at 49 C.F.R. § 1180.2(d)(7) because they are "part of a larger consolidation of facilities which should be subject to minimum New York Dock conditions." UTU-NY Petition To Revoke at 12-13. BLET characterizes the arrangements among CPRC, D&H and NSR as "a major corporate restructuring of operations." BLET Petition To Revoke at 3. These unsupported assertions provide no basis for revoking the class exemptions in this case.

Both UTU-NY and BLET base their characterization of the transactions on distorted and self-serving interpretations of the Memorandum of Understanding dated June 30, 2004 (the "MOU"), and the definitive documents setting forth the terms of the trackage rights, haulage and switching arrangements among the carriers. According to UTU-NY, "[t]he MOU is a comprehensive scheme" designed to "effectuat[e] a major regional restructuring and consolidation of carrier properties." UTU-NY Petition To Revoke at 6-7. BLET suggests that



“scrutiny by the Board of the MOU itself will conclusively prove” that the arrangements entered into by the carriers “are not the ‘ordinary operational agreements’ the Carriers say they are.” BLET Petition To Revoke at 6.<sup>5</sup>

As an initial matter, the trackage rights at issue here are based upon two separate and distinct trackage rights agreements – not the MOU. The MOU was not a legally binding agreement (MOU, Section IX. N), and the parties expressly contemplated that it would be superseded by trackage rights agreements and other definitive documents (MOU, Section IX. F). *See* Reply of CPRC and D&H In Opposition To Petition To Stay Operation of Exemption, filed October 6, 2004 at 4. Moreover, the trackage rights and haulage arrangements between NSR and D&H in the Rouses Point, NY – Binghamton, NY corridor are not in any manner contingent upon approval or implementation of the parties’ proposed arrangements in the Buffalo, NY – Binghamton, NY corridor (or vice versa).<sup>6</sup> BLET’s contention that the MOU “conclusively prove[s]” that the arrangements among CPRC, D&H and NSR constitute a “major corporate restructuring” (BLET Petition To Revoke at 3) has been squarely rejected by the Board. In denying the Unions’ stay petitions, the Chairman held that “[b]ased upon a review of [the documents submitted by the carriers], including the MOU, it appears that the transactions involved are routine operational agreements designed to improve the efficiency of the railroads’

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<sup>5</sup> BLET’s flawed characterization of the agreements between D&H and NSR is typified by its suggestion that the haulage rights granted to D&H on the Southern Tier have little worth because “D&H’s ability to provide service is dependent upon the addition of a haulage service fee (due to NSR) to what D&H otherwise charges.” BLET Petition To Revoke at 7. (BLET similarly disparages the D&H-NSR haulage arrangement in its Comments filed on November 10, 2004 in Docket No. AB-156 (Sub-No. 25X).) BLET’s statements ignore the fact that, by purchasing haulage services, D&H will avoid the trackage rights fees that it currently pays to NSR, as well as many of the expenses that D&H would otherwise incur in operating its own trains on the Southern Tier.

<sup>6</sup> *Id.* *See* Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson Ry. Co., Inc. Discontinuance of Trackage Rights*, Petition for Exemption at 8, n.4; Finance Docket No. 34561, CPRC Notice of Exemption, Exhibit 2, Agreement Section 22(n); Finance Docket No. 34562, NSR Notice of Exemption, Exhibit 2, Agreement, Section 22(n).

operations and do not involve any carrier consolidations.” *October 27 Decision* at 4 (emphasis added). Thus, the Unions’ reliance on the terms of the MOU and the definitive documents among CPRC, D&H and NSR to support their “consolidation” theory is misplaced.

A petition by UTU-NY for revocation of the trackage rights class exemption based upon arguments substantially similar to those advanced by UTU-NY here was denied by the Board in Finance Docket No. 34209 *et al.*, *Norfolk Southern Ry. Co. – Trackage Rights Exemption – Delaware and Hudson Ry. Co., Inc.*, (served November 25, 2002) (“*NS Trackage Rights*”). That case, like the present proceeding, involved grants of trackage rights and haulage rights pursuant to a “Restructuring Agreement” between D&H and NSR. UTU-NY sought revocation of the class exemption invoked by NSR, and imposition of the *New York Dock* labor protective conditions, on the grounds, *inter alia*, that the Restructuring Agreement evidenced a “consolidation” transaction under 49 U.S.C. § 11323. Finding that the ancillary haulage agreements were “irrelevant” to the trackage rights transactions, the Board denied UTU-NY’s petition for revocation. *NS Trackage Rights* at 3, 5.

BLET’s suggestion (BLET Petition To Revoke at 8) that the trackage rights transactions at issue here are subject to regulation under 49 U.S.C. § 11323 (a)(2) is meritless. As BLET acknowledges (*id.*), Section 11323(a)(2) applies only to transactions involving “[a] purchase, lease or contract to operate property of another carrier.” Neither the MOU nor any of the definitive agreements among CPRC, D&H and NSR provides for the “purchase” or “lease” of a rail line – and BLET does not contend otherwise. Nor do any of those agreements constitute a “contract to operate” within the meaning of Section 11323(a)(2). A “contract to operate” transaction is one in which a carrier agrees to take over the operation of a second carrier’s line, with the second carrier ceasing operations on the line. *See, e.g.*, Finance Docket No. 32640, *Canadian National Ry. Co.—Contract To Operate – Grand Trunk Western R. Co., et al.*, (served

April 18, 1995) (no contract to operate where “the evidence does not demonstrate that CN will take over and operate these properties”); Finance Docket No. 1375, *In Re Application of New York Central R. Co. For An Order Approving Operating Contract*, 70 I.C.C. 470 (1921) (contract to operate where carrier would “perform all the transportation upon and over the railroad” of another carrier). By contrast, *Trackage Rights Class Exemption* defines “trackage rights” as “arrangements among rail carriers to permit local service or bridge operations by one carrier over tracks owned by another carrier, while the owning carrier continues to provide service.” 1 I.C.C. 2d at 270, n.1 (emphasis added). As the definitive documents demonstrate, NSR will continue to provide service on the lines in Buffalo over which CPRC has acquired overhead trackage rights, and D&H will continue to provide its own service between Saratoga Springs and Binghamton, NY following implementation of NSR’s overhead trackage rights on that line.<sup>7</sup> Thus, the transactions at issue in this case are “trackage rights” subject to (and exempted from) the requirements of Section 11323(a)(6), not a “purchase, lease or contract to operate” subject to regulation under Section 11323(a)(2).

Finally, UTU-NY’s suggestion (UTU-NY Petition To Revoke at 10-11) that failure to revoke the trackage rights class exemptions in these proceedings “may preclude, or make difficult, the ability of the Board to deny the D&H’s petition for discontinuance, or to effectively impose conditions upon any discontinuance exemption” is sheer fantasy. The NSR Saratoga – Binghamton trackage rights have nothing whatsoever to do with the D&H Discontinuance Petition. The only traffic that NSR will handle via those rights is CN-NSR interline traffic, which will benefit from a substantially more efficient routing via D&H’s line between Rouses Point and Binghamton, NY. NSR’s exercise of those rights will not affect D&H’s ongoing

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<sup>7</sup> See Finance Docket No. 34561, CPRC Notice of Exemption, Exhibit 2, Agreement Section 2(a) (CPRC’s rights “shall be in common with Norfolk Southern”); Finance Docket No. 34562, NSR Notice of Exemption, Exhibit 2, Agreement, Section 2(a) (NSR’s rights “shall be in common with D&H”).

trackage rights operations on the Southern Tier line. Moreover, as UTU-NY itself acknowledges, CPRC's trackage rights agreement with NSR "do[es] not permit CPRC operation over the subject trackage until the effective date of any authorization or exemption of D&H discontinuance of trackage rights between Buffalo and Binghamton." UTU-NY Petition To Revoke at 8-9. Denying UTU-NY's frivolous challenge to the trackage rights exemptions at issue here will not prejudice the Board's ability to evaluate, and appropriately condition, the D&H discontinuance transaction.

**C. The *Norfolk & Western/Mendocino* Conditions Are Appropriate To These Trackage Rights Transactions.**

It has been settled for twenty-four years that the appropriate labor protective conditions in trackage rights transactions are the *Norfolk & Western* conditions, as modified in *Mendocino Coast Line*. In adopting the trackage rights class exemption, the ICC made clear that the *Norfolk & Western/Mendocino* conditions are likewise appropriate for cases handled under that exemption. Nevertheless, both UTU-NY and BLET ask the Board to impose the *New York Dock* conditions in these two unexceptional class exemption cases. There is no principled basis for the Unions' request.

UTU-NY now acknowledges that these transactions fall under Section 11323(a)(6) (acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line). CPRC and D&H agree. The appropriate protective conditions in all Section 11323(a)(6) cases are the *Norfolk & Western/Mendocino* conditions.

BLET contends that these transactions fall under Section 11323(a)(2) (purchase, lease, or contract to operate property of another rail carrier). Even if BLET were correct – and, as CPRC/D&H demonstrate above, it is not – the only transactions under that subsection that are subject to *New York Dock* conditions are purchase transactions. The transactions at issue here

certainly are not purchase transactions; indeed, as CPRC/D&H have shown, they do not fall under Section 11323(a)(2) at all.<sup>8</sup>

Labor unions frequently seek imposition of *New York Dock* conditions in cases where the standard *Norfolk & Western/Mendocino* conditions are appropriate, and such requests are routinely denied. Just two years ago, the Board denied a similar request by UTU-NY in connection with an earlier transaction involving the acquisition by NSR of trackage rights over D&H lines in New York. *NS Trackage Rights*. The Board agreed with UTU-NY that the “Restructuring Agreement” between the carriers in that case came within Section 11323, because it included grants of trackage rights. But the Board also made clear that “only the *Norfolk and Western* conditions are imposed” on trackage rights transactions. *Id.* at 5.

There are no special circumstances that might call into question the appropriateness of the *Norfolk & Western/Mendocino* protective conditions in the instant proceedings. CPRC’s acquisition of trackage rights in the Buffalo area (Finance Docket No. 34561) will not adversely affect any employees. CPRC’s own crews, who are represented by Canadian labor unions, will simply operate CPRC trains from the Canadian border to and from NSR’s Bison Yard, just as they operate such trains to and from SK Yard today. No D&H or NSR employees have previously been involved in the movement of those trains, and none will be involved when CPRC exercises its overhead rights to access Bison Yard.

Nor will the NSR Saratoga-Binghamton trackage rights adversely affect any D&H employees. To the contrary, that transaction will be beneficial to D&H employees, because the purpose of those trackage rights is to allow NSR to divert to D&H’s lines NSR-CN interline

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<sup>8</sup> BLET extravagantly asserts that “[t]he employee protective conditions required in a Section 11323 transaction are the *New York Dock* conditions” (BLET Petition to Revoke at 8). This assertion ignores the fact that trackage rights, leases and all the other types of transactions for which protective conditions other than *New York Dock* are appropriate are also regulated under Section 11323 transactions.

traffic that does not now move over that route. D&H itself will add jobs to handle this new traffic between Rouses Point and Saratoga Springs, NY.<sup>9</sup> NSR, too, will add jobs as a consequence of acquiring these trackage rights.<sup>10</sup>

As D&H has previously explained, 25 agreement positions will be eliminated at SK Yard in Buffalo as a result of D&H's proposed discontinuance of trackage rights over NSR's Southern Tier Lines.<sup>11</sup> The Board will have ample opportunity in the discontinuance proceeding to consider the effects of that transaction on D&H employees, and presumably will impose the standard *Oregon Short Line* conditions for the benefit of affected employees. The *Oregon Short Line* conditions provide the same substantive benefits as the *New York Dock* and *Norfolk & Western/Mendocino* conditions. They also mandate the same procedures as *New York Dock*, including requirements that the carrier give its employees 90 days' notice of implementation, and that implementing agreements be reached before the transaction is consummated. UTU<sup>12</sup>, BLET, and any other labor unions representing D&H employees who may be affected by the discontinuance transaction will have a full opportunity to negotiate appropriate terms for the

<sup>9</sup> See Docket No. AB-156 (Sub-No. 25X), Petition for Exemption filed October 1, 2004 at 14-15.

<sup>10</sup> Petitioner Samuel J. Nasca (UTU-NY) asserts that he is "concerned" about the NSR Saratoga-East Binghamton trackage rights transaction, claiming that he fears that NSR's use of D&H's line will not be confined to the scope of the trackage rights that have been granted and authorized by the class exemption. Supplemental Verified Statement of Samuel J. Nasca, October 25, 2004. Mr. Nasca's supposed "fear" is groundless and plainly does not provide a reason for revoking the trackage rights exemption that has already gone into effect.

<sup>11</sup> See Docket No. AB-156 (Sub-No. 25X), Petition for Exemption filed Oct. 1, 2004 at 14-15.

<sup>12</sup> The United Transportation Union ("UTU"), not the union's New York legislative board (known in these cases as "UTU-NY") is the representative of certain D&H employees for purposes of collective bargaining and presumably will speak for them in the negotiation of any required implementing agreements. UTU petitioned for a stay of the trackage rights transactions, but has not sought revocation of the class exemptions at issue here, nor has UTU, to our knowledge, submitted comments in connection with the discontinuance transaction.

specific application of the *Oregon Short Line* protective conditions to those employees before any adverse effect is felt by them.<sup>13</sup>

Implementation of the trackage rights transactions at issue here will not prejudice the rights of D&H employees who may be affected when the discontinuance transaction is eventually implemented. The CPRC Buffalo trackage rights will be implemented simultaneously with the proposed D&H discontinuance. NSR's implementation of its trackage rights transaction, which allows for a rerouting of traffic now handled from Buffalo to Binghamton by NSR, not D&H, will not adversely affect any D&H employees, and will not prevent any employees who may be affected by the D&H discontinuance from taking full advantage of the procedural and monetary protections afforded to them under the *Oregon Short Line* conditions.

In support of its request for imposition of *New York Dock*, UTU-NY asserts (UTU-NY Petition to Revoke at 8) that the transactions at issue here involve a "yard consolidation at Buffalo." That proposition is plainly not true. The NSR Saratoga – Binghamton trackage rights obviously do not affect Buffalo yard operations at all. CPRC will use its newly acquired trackage rights at Buffalo only for the purpose of moving its own trains in and out of NSR's Bison Yard. Neither CPRC nor D&H will perform any switching or other yard activities within Bison Yard. When D&H obtains the requisite authority to discontinue its trackage rights between Buffalo and Binghamton, it will cease to be an operating rail carrier at Buffalo, and certainly will not be participating in NSR's operations there. Indeed, no D&H employees will

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<sup>13</sup> BLET seems not to understand the working of the *Oregon Short Line* conditions, asserting incorrectly, in its Comments filed on November 10, 2004 in Docket No. AB-156 (Sub-No. 25X) (at 4), that D&H employees "will not enjoy the right to have an implementing agreement in place before the transaction." In the same Comments, BLET implicitly acknowledges that what it seeks is that the *New York Dock* conditions be made applicable to the discontinuance, "as they are for major consolidations, mergers and acquisitions." *Id.* But neither the D&H discontinuance nor the instant trackage rights transactions are "major consolidations," or "mergers," or "acquisitions," and the standard protective conditions that apply to the CPRC, NSR and D&H transactions provide ample and appropriate measure of protection to all employees who may be affected.

remain at Buffalo. NSR alone operated Bison Yard before these transactions, and NSR alone will operate Bison Yard after the trackage rights at issue here (and the D&H discontinuance) are implemented.

Even assuming *arguendo* that UTU-NY is correct in characterizing these trackage rights transactions as effectuating an operational “consolidation” of some sort at Buffalo – and it is not – the *New York Dock* conditions would still not be the appropriate conditions. In Finance Docket No. 32299, *Norfolk Southern Ry. Co. – Consolidation of Operations – CSX Transportation, Inc.* (served November 22, 1993) (“*NS-CSX Consolidation*”), the applicants explicitly characterized their exchange of trackage rights, haulage rights and switching arrangements as a “consolidation of operations.” In approving what it called “[t]he application . . . to consolidate,” the ICC noted that “[o]rdinarily, the *New York Dock* conditions are imposed in purchase, merger, or control transactions, and the *Mendocino* conditions are imposed in lease or trackage rights transactions” (*id.* at 3) (footnote omitted). Accordingly, the ICC imposed *Mendocino* in that case. (*id.* at 4). The *NS-CSX Consolidation* decision makes it perfectly clear that the protective conditions to be imposed are those appropriate to the substance of the specific transactions that underlie a so-called operational “consolidation.”

At bottom, the Unions’ contention is that an assertedly higher degree of employee protection (*New York Dock*) is warranted in these trackage rights cases because CPRC, D&H, and NSR have also entered into various agreements providing for haulage and switching services that are not subject to Board regulation. But the existence of such ancillary agreements does not transform ordinary overhead trackage rights transactions into something they are not. The Unions do not cite a single case in which an exchange between carriers of trackage rights, haulage rights and switching services, no matter how extensive, has been subjected to *New York Dock* in the absence of circumstances evidencing an acquisition of control of one carrier by

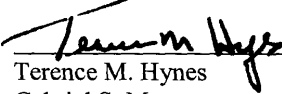


another. Indeed, prior decisions of the Board and the ICC have routinely imposed standard *Norfolk & Western/Mendocino* conditions in similar situations. See, e.g., *NS Trackage Rights*; Finance Docket No. 33780, *Kansas City Southern Railway Company--Trackage Rights Exemption--Gateway Western Railway Company and Gateway Eastern Railway Company*, (served September 16, 1999); *NS-CSX Consolidation*.

### CONCLUSION

For all of the foregoing reasons, CPRC and D&H respectfully request that the Board deny the UTU-NY Petition To Revoke and the BLET Petition To Revoke.

Respectfully submitted,



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November 12, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 12th day of November, 2004, I served the foregoing Reply of Canadian Pacific Railway Company and Delaware and Hudson Railway Company, Inc. In Opposition to Petitions To Revoke Exemptions by causing a copy thereof to be hand-delivered to:

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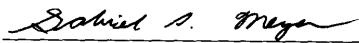
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